

EXHIBIT A

REDACTED

BOIES SCHILLER FLEXNER LLP

David Boies (admitted pro hac vice)
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165
Beko Reblitz-Richardson, CA Bar No. 238027
Erika Nyborg-Burch, CA Bar No. 342125
44 Montgomery St., 41st Floor
San Francisco, CA 94104
Tel.: (415) 293-6800
mmao@bsfllp.com
brichardson@bsfllp.com
enyborg-burch@bsfllp.com

James Lee (admitted pro hac vice)
Rossana Baeza (admitted pro hac vice)
100 SE 2nd St., 28th Floor
Miami, FL 33131
Tel.: (305) 539-8400
jlee@bsfllp.com
rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334
725 S Figueroa St., 31st Floor
Los Angeles, CA 90017
Tel.: (213) 995-5720
alanderson@bsfllp.com

SUSMAN GODFREY L.L.P.

Bill Carmody (admitted pro hac vice)
Shawn J. Rabin (admitted pro hac vice)
Steven M. Shepard (admitted pro hac vice)
Alexander Frawley (admitted pro hac vice)
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel.: (212) 336-8330
bcarmody@susmangodfrey.com
srabin@susmangodfrey.com
sshepard@susmangodfrey.com
afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Tel.: (310) 789-3100
abonn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted pro hac vice)
Ryan J. McGee (admitted pro hac vice)
201 N. Franklin Street, 7th Floor
Tampa, FL 33602
Tel.: (813) 223-5505
jyanchunis@forthepeople.com
rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805
711 Van Ness Ave, Suite 500
San Francisco, CA 94102
Tel: (415) 358-6913
mram@forthepeople.com

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' [PROPOSED] SUR-REPLY
IN OPPOSITION TO GOOGLE'S
MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Yvonne Gonzalez Rogers
Hearing Date: May 12, 2023
Time: 1:00 p.m.
Location: Courtroom 1 – 4th Floor

1 Sensing defeat, Google’s summary judgment reply brief desperately adds a new argument
 2 related to Plaintiffs’ CDAFA claim. Google claims that the “CDAFA requires that the defendant
 3 circumvent[] technical or code-based barriers, or otherwise render ineffective any barriers . . . to
 4 prevent access,” and Google argues that Plaintiffs cannot meet this standard. Dkt. 934 at 13.

5 Courts have rejected this interpretation of the CDAFA. In 2015, the Ninth Circuit clarified
 6 that, unlike the Computer Fraud and Abuse Act, the CDAFA “does not require unauthorized
 7 access. It merely requires knowing access.” *United States v. Christensen*, 828 F.3d 763, 789 (9th
 8 Cir. 2015). The “term ‘access’ as defined in the [CDAFA] includes logging into a database with
 9 a valid password and subsequently taking, copying, or using the information in the database
 10 improperly.” *Id.* In light of *Christensen*, numerous courts have rejected Google’s contention that
 11 technical circumvention is required. *See, e.g., Henry Schein, Inc. v. Cook*, 2017 WL 783617, at
 12 *5 (N.D. Cal. Mar. 1, 2017) (explaining how the Ninth Circuit in *Christensen* resolved “a split
 13 of authority” over whether technical circumvention is required, and held it was not); *Rodriguez*
 14 *v. Google*, 2021 WL 2026726, at *7 (N.D. Cal. May 21, 2021) (similar).

15 *Rodriguez* is instructive. Google likewise argued that “a party only acts ‘without
 16 permission’ when it ‘circumvents technical or code-based barriers in place to restrict or bar a
 17 user’s access.’” *Id.* at *7. The court disagreed: “the Ninth Circuit repeatedly has emphasized that
 18 ‘[a] plain reading of the statute demonstrates that its **focus is on the unauthorized taking or use**
 19 **of information.**” *Id.* (emphasis added) (quoting *Christensen*, 828 F.3d at 789). Plaintiffs need
 20 only demonstrate “Google’s knowing access to, and unpermitted taking of, plaintiffs’ [] data.”
 21 *Id.* Here, whether Google had permission to access Plaintiffs’ private browsing data is a triable
 22 issue of fact because a jury could find that Google did not obtain their consent to collect this data.
 23 *See also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1101 (N.D. Cal. 2015) (even before
 24 *Christensen*, casting doubt on the technical-circumvention standard, reasoning that to “hold[] that
 25 a defendant acts with ‘permission’ for purposes of the CCDFFA any time it does not need to
 26 overcome ‘technical or code based barriers in place to restrict or bar a user’s access’ leads to

1 results which strain the plain and ordinary meaning of the term ‘permission’’).

2 But even if the Court were to overlook *Christensen*, there would still be a triable issue of
3 fact because Plaintiffs have uncovered evidence demonstrating there is no way to prevent
4 Google’s collection of private browsing data. Dkt. 933-3 (SUF 79). This evidence includes
5 Plaintiffs’ expert’s analysis as well as admissions from Google employees and experts. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Such evidence raises a triable issue
9 of fact even under Google’s (legally incorrect) standard because Plaintiffs “had no way to remove
10 the [Google tracking beacons] or to opt-out of [their] functionality.” *In re Carrier IQ, Inc.*, 78 F.
11 Supp. 3d at 1101. “That is sufficient” under Google’s proposed test. *Id.*

12 Dated: April 28, 2023

13 BOIES SCHILLER FLEXNER LLP

14 By /s/ Mark Mao

15 Mark C. Mao (CA Bar No. 236165)
mmao@bsflp.com

16 Beko Reblitz-Richardson (CA Bar No. 238027)
brichardson@bsflp.com

17 Erika Nyborg-Burch (CA Bar No. 342125)
enyborg-burch@bsflp.com

18 BOIES SCHILLER FLEXNER LLP

19 44 Montgomery Street, 41st Floor

20 San Francisco, CA 94104

21 Telephone: (415) 293 6858

22 Facsimile (415) 999 9695

23 David Boies (admitted pro hac vice)

24 dboies@bsflp.com

25 BOIES SCHILLER FLEXNER LLP

26 333 Main Street

27 Armonk, NY 10504

28 Telephone: (914) 749-8200

Facsimile: (914) 749-8300

James W. Lee (*pro hac vice*)

jlee@bsflp.com

Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304

Amanda Bonn (CA Bar No. 270891)
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100

Bill Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
Alexander P. Frawley (*pro hac vice*)
afrawley@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Telephone: (212) 336-8330

John A. Yanchunis (*pro hac vice*)
jyanchunis@forthepeople.com
Ryan J. McGee (*pro hac vice*)
rmcgee@forthepeople.com
MORGAN & MORGAN, P.A.
201 N Franklin Street, 7th Floor
Tampa, FL 33602
Telephone: (813) 223-5505
Facsimile: (813) 222-4736

Michael F. Ram, CA Bar No. 104805
MORGAN & MORGAN
711 Van Ness Ave, Suite 500
San Francisco, CA 94102
Tel: (415) 358-6913
mram@forthepeople.com

Attorneys for Plaintiffs